



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 777 OF 1985

IN THE MATTER OF THE ESTATE OF KIMARI GITERE (DECEASED)

RULING

1. By Chamber Summons dated 27th October 2017 and filed on 30th October 2017 under certificate of urgency pursuant to Sections 1A and 3A, Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure rules, the Applicant herein Charity Wacheke Kimari sought orders as follows:

(1) Spent.

(2) That pending the hearing and determination of this application, a stay of execution be issued against the ruling delivered on 29th September 2017 by Hon. Justice J.N. Onyiego.

(3) That pending hearing and determination of appeal, a stay of execution be issued against the ruling delivered on 29th September 2017 by Hon. Justice J.N. Onyiego.

2. The Application is predicated upon grounds set out on the face of it and affidavit deposed on 27th October 2017 by Charity Wacheke Kimari in which she averred that the impugned ruling made adverse orders against 3rd parties and beneficiaries who were not party to the proceedings in respect of the Application dated 1st August 2016. That the orders condemning 3rd parties unheard in respect of the Application dated 1st August 2016 is against the principles of natural justice thus necessitating the filing of the said appeal.

3. That unless a stay order pending the intended appeal is granted, she will stand prejudiced as the Respondents have threatened to institute contempt proceedings against her hence a likelihood of rendering the intended appeal which has high chances of success nugatory.

4. Upon service of the application, the 1st and 3rd Respondents filed their grounds of opposition dated 17th April 2018 and 8th November 2017 respectively. The 2nd Respondent although served did not file any response. According to the 1st Respondent's grounds of opposition, it is alleged that:

(1) The application lacks merit and is merely intended to delay justice to the 1st Respondent.

(2) The Applicant has been and is still in contempt of court orders issued by Justice Lenaola on 27th January 2012 and Justice Musyoka on 18th

December 2015 in which she has never filed an appeal.

(3) The Applicant will not suffer any prejudice if the orders sought are not granted and it is actually the 1st Respondent and other beneficiaries of the estate who stand to suffer irreparable loss for as long as the Applicant continues to disobey executing court orders.

(4) The Application is therefore frivolous, vexatious, and an abuse of the court process hence should be dismissed.

5. On the other hand, the 3rd Respondent stated that:

(1) No grounds have been advanced to support the claim that the appeal has high chances of success.

(2) The said application lacks merit or otherwise in law and ought to be dismissed with costs.

(3) The applicant has not come to court with clean hands since she has been and still is in contempt of court orders given as long as:

(a) 27th January 2012 by Lenaola J (as he then was).

(b) 18th December 2015 by Musyoka J and to which no appeal was ever filed.

(4) That in view of the said contempt this honourable court should decline to hear the Administrator/Applicant until and unless she has purged her contempt and obeyed the said court order.

(5) No proper grounds have been adduced to warrant a stay of execution against the ruling of the Hon. Onyiego J. delivered on 29th September 2017.

(6) The Applicant has not demonstrated what prejudice she or the other beneficiaries of the estate of the deceased will suffer if the sought orders are not granted.

(7) Contrary to what is stated in ground 4 of the said application, the respondents and other beneficiaries of the estate stand to suffer irreparable loss for as long as the Applicant continues unabatedly to disobey existing court orders.

(8) The said Application dated 27th October 2017 is frivolous, vexatious and an abuse of the court process and the same should be dismissed.

6. When the matter came up for hearing on 2nd July 2018, parties agreed to dispose of the same by way of written submissions. Consequently, Mrs. Muigai appearing for the Applicant filed their submissions together with authorities on 29th June 2018, Nzilani Muteti Advocates representing the 1st Respondent filed theirs on 29th May 2018 and Kimamo Kuria Advocates appearing for the 3rd Respondent filed theirs on 27th June 2018.

Applicant's Case

7. In her submissions, Mrs. Muigai for the Applicant reiterated the contents of the affidavit in support of the application. Counsel submitted that the impugned ruling seeks to affirm Judge Lenaola's ruling delivered on the 27th day of January 2012 and amended by J. Musyoka on 18th December 2015. Learned counsel took issue with the ruling of J. Lenaola claiming that the honourable Judge misapprehended the situation, refused and failed to appreciate the fact that it would not have been possible for one administrator Joyce Kimari co-Administrator to transfer some properties of the estate to 3rd parties.

8. Mrs. Muigai further submitted that the court was misled into issuing orders that amount to a breach of 3rd party property rights as they were never enjoined in the applications before court to enable them to be heard before orders prejudicial to them were pronounced. Counsel further averred that the orders of Judge Lenaola are not implementable as the surrender of title deeds already in the hands of 3rd parties (buyers) are not in the applicant's custody to surrender them for cancellation.

9. Mrs. Muigai asserted that, it is because of J. Lenaola's orders that the Applicants wishes to challenge the ruling of this court dated 29th September 2017 so that she can ventilate her case in challenging Lenaola's orders before the Court of Appeal.

1st Respondent's Case

10. In support of the 1st Respondent's case, Mr. Nzilani Muteti outlined a brief history of the case and thus opposed the grant of stay orders claiming that the Applicant had not met the criteria set out in the case of **Machira T/A Machira and Co. Advocates vs East African Standard HCCC No. 612/1996** in which the court held that issuance of stay order(s) is a matter of discretion by the court.

11. Counsel argued that, in granting stay, the court must ensure that a successful litigant must not lose the benefits of her/his judgment. Secondly, that the Applicant must prove a likelihood of suffering substantial loss which may not be compensated by monetary reward and that the appeal is filed within reasonable time. Mr. Muteti opined that the orders of Judge Lenaola and Musyoka which this court confirmed on 29th September 2017 are still intact and the applicant has blatantly disobeyed the same hence acts of contempt of court.

3rd Respondent's Case

12. Just like the 1st respondent, Mr. Kimamo for the 3rd respondent gave a brief historical background of the case. Principally, he opposed the application stating that the same lacks merit and is merely intended to delay justice. Counsel further submitted that no grounds in support of the application had been adduced and that having disobeyed both J. Lenaola's and Musyoka's court orders the applicant's hands are tainted.

Analysis and Determination

13. I have considered the application herein, affidavit in support, grounds of opposition by both the 1st and 3rd Respondents plus submissions by their respective counsels. Issues for determination are: whether the application for stay filed within reasonable time; whether the

Applicant likely to suffer substantial loss if the orders are not granted; whether the appeal is likely to be rendered nugatory in the event the Application is not allowed. Before I endeavour to address and determine the application herein, a brief background of this case would suffice.

14. The deceased herein who was predeceased by his first wife Loise Wanjiru was survived by a widow (2nd wife) known as Joyce Wangari Kimari and 5 children from each house making a total of 10 children.

15. In 1985, Joyce Wangari Kimari petitioned the court as a sole administratrix to the exclusion of the 1st house thus prompting Samuel Gitere Kimari a son from the 1st house to file an objection which was upheld by J. Apoloo on 16th July 1986 thus issuing joint letters of administration to the said Samuel Gitere and Joyce Wangari. Dissatisfied with that decision, Joyce appealed to court of appeal but the same was dismissed.

16. Subsequently, the grant was confirmed but by omission the certificate vested the assets of the estate absolutely into the two administrators instead of holding in trust for the other beneficiaries. Taking advantage of the anomaly, the Administrator and Administratrix transferred the properties into themselves to the total exclusion of the other beneficiaries.

17. Unfortunately, Samuel Gitere died on 7th March 2006 culminating to his substitution with Jemimah Jane Wacheke Kimari (3rd respondent) on 16th August 2006. Having realized that Joyce Wangari Kimari was not administering the estate properly and taking notice of the original mistake, Jemimah Jane Wacheke filed summons for revocation dated 11th December 2006 seeking revocation of the confirmed grant. In support of Jemimah's application, Florence Wangari (1st respondent) and Shem Kihara (2nd respondent) children to Joyce Wangari filed application dated 27th September 2007 also seeking revocation on similar grounds just as Jemimah's.

18. In determining the applications for revocation, Justice Lenaola made the following orders:

(i) The grant issued on 16th July 1986 in respect of Wangari Kimari be revoked and any one person as shall be agreed by members of the house be appointed in her place to join Jemimah Jane Wacheke Kimari as co-administrator. In the event of disagreement, the court shall invoke Section 66 of the Law of Succession Act and appoint such a person.

(ii) All the properties listed in the petition for grant of letters of administration as registered in the deceased's names and any other property (if at all) not so listed shall revert to the deceased's name pending fresh distribution. For avoidance of doubt, all titles issued and sub-divisions thereof are hereby nullified.

(iii) Parties to agree on a fresh mode of distribution taking into account any gifts by the deceased to any party and also taking into account the present occupancy of any parcel of land by any beneficiary and if no agreement is reached within 45 days, parties may file their affidavits on distribution and the court may proceed to distribute the estate in accordance with Section 40 of the Law of Succession.

19. Upon service of the said application on the Land's office for execution, the land Registrar demanded the order to list all properties affected. By application dated 27th July 2012 filed by Jemimah, J. Musyoka amended the order on 18th December 2015 and same was issued on 31st March 2016 thus repeating J. Lenaola's directions as per order No. 2

20. By application dated 26th July 2017, Jemimah attempted to have the estate distributed in accordance with beneficiaries shares. At the same time, the applicant herein filed an Application dated 1st August 2016 seeking implementation of Judge Lenaola's orders. In my ruling dated 29th September 2017, I dismissed the Application dated 26th July 2017 because the proposed mode of distribution was not supported by any consent or agreement from beneficiaries as directed by J. Lenaola and Musyoka. I however allowed the Application dated 1st August 2016 directing that the applicant and other parties to comply with the orders of J. Lenaola and Musyoka. It is this order that is being challenged and appealed against.

21. It is trite that an order for stay is purely an issue of discretion by the court seized of the matter but which must be exercised judicially **(See Absalom Dova vs Tarbo Transporters (2013) eKLR and Selestila Ltd and Gold Neck Development Ltd (2015) eKLR).**

22. A grant for stay orders is anchored under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules. Sub-rule 2 requires proof by the applicant that he or she is likely to suffer substantial loss if the application for stay is not allowed. Second, that the application is filed within reasonable time and that where appropriate security for due performance of the decree has been furnished

23. The applicant herein is challenging orders of this court dated 29th September 2017 directing that the Applicant does comply with previous orders made by J. Lenaola and Musyoka. I did not make any specific orders capable of execution to warrant stay. What substantial loss is the applicant likely to suffer by being directed to honour court orders made way back the 2012 and which have never been appealed against? Mrs. Muigai admitted in her submissions that they are using this court's ruling dated 29th September 2017 to enable them challenge J. Lenaola's and Musyoka's orders which they have never appealed against. I do agree with the respondents that this is an afterthought.

24. In my ruling of 29th September 2017, I stated unequivocally that I had no powers to overturn Judge Lenaola's orders as the aggrieved parties ought to have appealed. There is nothing to appeal against in my ruling of 29th September 2017. The applicant is hiding behind this ruling to circumvent rules of procedure on appeals to challenge orders made 2012 which they never appealed against.

25. By being told to distribute the estate afresh by consent is not in any way prejudicial. I do not find any substantial loss to be suffered by executing J. Lenaola's orders. The applicant has not proved to the required degree the specific substantial loss to be suffered and how the

appeal will be rendered nugatory if the orders are not stayed. In the case of Antonie Adaye vs African Virtual University (2015) eKLR, the court defined what substantial loss entails as follows:

“...substantial loss does not represent any particular mathematical formula rather it is a qualitative concept. It refers to any loss, great or small, that is real, worth or value as distinguished from a loss without value or a loss that is merely nominal.....”.

26. The applicant in this case is worried of 3rd parties' interests whose rights are likely to be affected. Unfortunately, none of the 3rd parties referred to has ever questioned or challenged the orders of J. Lenaola. The applicant cannot represent anonymous 3rd parties in the abstract.

27. I do not find any substantial loss likely to be suffered by the applicant if stay is not granted other than to run away from obedience to court orders that have been in force for six years now.

28. This court will not aid a party who has disobeyed its orders to escape responsibility or culpability by issuing stay orders. He who seeks equity must come to court with clean hands. For those reasons that ground is not sustainable.

29. As regards filing the application within reasonable time, the same is disguised as challenging orders of 29th September 2012 but in essence and substantially targeting to challenge orders made in the year 2012. For purposes of this application, it was filed in good time and actually within 30 days which is reasonable although in bad faith.

30. Concerning furnishing security, this is not a monetary claim hence not relevant. As to the question of the appeal being rendered nugatory, there is nothing to appeal against in respect to the orders of 29th September 2017 which merely directed parties to comply with the orders of J. Lenaola made the year 2012. That ground is also not available.

31. It is my finding that the application filed herein on 30th October 2017 and dated 29th October 2017 is unmeritorious and the same is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28th DAY OF SEPTEMBER, 2018.

J.N. ONYIEGO (JUDGE)